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Voting Rights for Non-Citizens: The European Multilevel and the US Federal Constitutional Systems Compared¹

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Voting rights – Citizens and aliens – European multilevel architecture – US federal system – Comparative methodology – Different regulatory models for non-citizens suffrage at the state level in Europe – Impact of supranational law – Challenges and tensions – Analogous dynamics in the US constitutional experience – Recent European legal and jurisprudential developments in comparative perspective – What future prospects for citizenship and democracy in Europe?

INTRODUCTION

The right to vote and to participate in political life is an essential component of any democracy.² As Thomas Jefferson famously wrote in the 1776 Declaration of Independence, ‘governments are instituted among men deriving their just powers from the consent of the governed.’³ Who ought to be considered as ‘the governed’, has nonetheless remained a largely unsettled question in legal practice and politi-

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² R. Dahl, *On Democracy* (Yale UP 1998) p. 33 defines democracy as an association of people characterized by five standards: ‘1. effective participation 2. equality in voting 3. gaining enlightened understanding 4. exercising final control over the agenda 5. inclusion of adults.’

³ For an historical account of the philosophical underpinnings of the Declaration of Independence cf. G. Wood, *The Creation of the American Republic* (Norton 1993) p. 181.

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cal theory ever since.⁴ Historically, the boundaries of the franchise have been the object of contestation in almost any constitutional system and it is only through slow and uneven developments that disenfranchised groups such as poor, women, minorities and youths have obtained the right to participate in the body politic.⁵

This article analyses the regulation of voting rights for non-citizens in the European multilevel constitutional system. The pluralist arrangement that exists in Europe due to the overlap of the legal orders of the member states, of the European Union (EU) and of the European Convention on Human Rights (ECHR) is increasingly described by scholars as a 'multilevel constitutional architecture.'⁶ A widespread assumption among constitutional lawyers is that the European system is a *sui generis* arrangement. Nevertheless, I have argued elsewhere that the European multilevel architecture can be meaningfully compared with other federal systems and that, if compared, it can also be better understood.⁷

The purpose of this article is therefore to study the European electoral rights regime for non-citizens and the implications emerging from a multilevel constitutional architecture, in a comparative perspective with the federal experience of the United States of America (US). To clarify the terminology, with the term 'non-citizens' (or 'aliens' or 'foreigners') I refer here both to citizens of a member state of the EU or the US who reside in another member state of the EU or the US (i.e. – according to the European legal jargon – 'second-country nationals') and to citizens of a non-member country who permanently reside within a member state of the EU or the US (i.e., 'third-country nationals').

The article argues that the complex interplay among national and transnational laws in the European multilevel architecture has created new challenges and tensions in the field of electoral rights for non-citizens. Several inconsistencies, in particular, seem to emerge from the interaction between states' electoral laws and the voting rights regime developing at the EU level. At the same time, however,

⁴ Cf. C. Rodriguez, 'Noncitizen Voting and the Extraconstitutional Construction of the Polity', 8 *I-Con* (2010) p. 30; R. Bauböck, 'Global Justice, Freedom of Movement and Democratic Citizenship', *European J. of Sociology* (2009) p. 1.

⁵ As M. Troper, 'The Concept of Citizenship in the Period of the French Revolution', in M. La Torre (ed.), *European Citizenship: an Institutional Challenge* (Kluwer 1998) p. 27 has rightly emphasised, since the French Revolution a distinction was drawn between 'citizenship' and 'nationality' precisely for the purpose of defining that privileged class of individuals who, amidst the nationals of a state, enjoyed full political rights (i.e., the citizens). Cf. also B. Guiget, 'Citizenship and Nationality: Tracing the French Roots of the Distinction', in M. La Torre (ed.), *European Citizenship: an Institutional Challenge* (Kluwer 1998) p. 95.

⁶ Cf. I. Pernice, 'Multilevel Constitutionalism in the European Union', 27 *Eur. L. Rev.* (2002) p. 511; M.P. Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Hart 2003) p. 501.

⁷ Cf. F. Fabbrini, 'The European Multilevel System of Fundamental Rights Protection: A "Neo-Federalist" Perspective', *Jean Monnet Working Paper* No. 15 (2010).

this article claims that the dynamics at play in Europe are not unique. Rather, the experience of the US in the field of alien suffrage and citizenship underlines how the interplay between state and federal law have historically produced phenomena in the US that are akin to the ones existing in Europe.⁸

To this end, the article is structured as follows. It begins by examining the legislation regulating electoral rights for non-citizens in the EU member states and explores the increasing impact that supranational law exercises within domestic legal systems. It then analyzes the tensions and challenges that this overlap generates. Thirdly it introduces a comparative assessment to argue that analogous dynamics have characterized the constitutional experience of the US. Finally the paper evaluates the most recent transformations brought about by the case-law of the European courts and EU Lisbon Treaty and discusses whether further reforms would be advisable to address some of the remaining inconsistencies in the European electoral rights regime.

ELECTORAL RIGHTS FOR NON-CITIZENS IN THE EUROPEAN MULTILEVEL ARCHITECTURE

Since the end of World War II Europe has experienced a progressive expansion of political rights.⁹ A fundamental right to vote for citizens, regardless of sex, wealth and social conditions, has been enshrined in the fundamental laws of most member states and recognized under the ECHR. Developments at the level of the EU, otherwise, have further increased the mechanisms of democratic representation.¹⁰ Despite this trend toward the extension of the franchise, however, significant variations exist on how the question of voting rights for non-citizens is dealt with in each layer of the European multilevel system.¹¹ The enfranchisement of aliens

⁸ The focus of this article will be on the regulation of electoral rights for non-citizens. For a broader assessment of how the electoral rights regime interplays in Europe with the domestic legislation on nationality cf. F. Fabbrini, 'The Right to Vote for Non-Citizens in the European Multilevel System of Fundamental Rights Protection. A Case Study in Inconsistency?', *Eric Stein Working Paper No. 4* (2010) from which this paper draws.

⁹ In his celebrated sociological theory of citizenship T. Marshall, *Citizenship and Social Class* (Cambridge UP 1950) argued that political rights (i.e., voting rights) were the second wave of entitlements that the people obtained *vis-à-vis* the state in the course of the 19th century, after the acquisition of civil rights in the 18th century liberal revolutions and before the conquest of social rights during the 20th century.

¹⁰ Cf. Editorial, 'Thinking about Elections and About Democratic Representation', 7 *EuConst* (2011) p. 1.

¹¹ Cf. V. Giraudon, 'Citizenship Rights for Non-Citizens', in C. Joppke (ed.), *Challenge to the Nation-State* (Oxford UP 1998) p. 272 and C. Joppke, 'The Evolution of Alien Rights in the United States, Germany and the European Union', in A. Aleinikoff and D. Klusmeyer (eds.),

is indeed a reflection of traditions of political and social inclusion,¹² and relevant differences exist in the vision of the polity embedded in national, EU and ECHR law.

At the state level – despite the existence of a plurality of statutory frameworks – it seems possible to classify the positions of the EU member states on the issue of voting rights for non-citizens in four regulatory models. These models can be ideally placed in a continuum: ranging from legal systems which are rather open toward the extension of the franchise, even in national elections, to the benefit of qualified non-citizens – to legal systems which are, instead, extremely restrictive in limiting the right to democratic participation only to nationals, in the name of an ethnic, identity-based, conception of the people.¹³

At one extreme of the spectrum lie the United Kingdom (UK) and Ireland, which grant voting rights to selected classes of resident aliens not only at the local level but also in national elections.¹⁴ In the UK – pursuing to a tradition dating to the time of the British Empire and codified in the Representation of the People Act¹⁵ – participation in national parliamentary elections is ensured to anybody who ‘is either a Commonwealth citizen or a citizen of the Republic of Ireland’ and permanently resides in the UK.¹⁶ To reciprocate, Ireland enacted in 1984 a constitutional revision bill¹⁷ which, by overruling a contrary opinion of the Supreme Court,¹⁸ allowed UK citizens residing in Ireland to cast their votes for the Irish legislative assembly.¹⁹

Citizenship Today: Global Perspectives and Practices (Carnegie Endowment for International Peace 2001) p. 36.

¹² Cf. U. Preuss et al., ‘Traditions of Citizenship in the European Union’, 7 *Citizenship Studies* (2003) p. 3 at p. 8 and L. Bosniak, ‘Constitutional Citizenship Through the Prism of Alienage’, 63 *Ohio St. L.J.* 5 (2002) p. 1285.

¹³ For an assessment of the legislation of the member states on alien suffrage in the broader context of the process of European integration cf. J. Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of the Political Space* (Cambridge UP 2007) p. 76 et seq.

¹⁴ Cf. H. Lardy, ‘Citizenship and the Right to Vote’, 17 *OJLS* (1997) p. 75 at p. 77–78.

¹⁵ Representation of the People Act (RPA) 1983, Eliz. II c. 2 (consolidated version).

¹⁶ RPA S. 2(1)(c).

¹⁷ 9th Amendment to the Ir. Const. codified as Art. 16(1)(2) stating that ‘(i) All citizens, and (ii) such other persons in the State as may be determined by law, without distinction of sex who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the election of members of the House of Representatives, shall have the right to vote at an election for members of the House of Representatives.’ The constitutional provision was implemented through the adoption of S. 2 Electoral (Amendment) Act 1985 (Act No. 13/1985) which expressly extended voting rights for Parliamentary elections to ‘British citizen[s].’

¹⁸ Irish Supreme Court, *In re Matter of Art. 26 of the Constitution and in the Matter of the Electoral (Amendment) Bill 1983* [SC No. 373 of 1983] IR 268.

¹⁹ Cf. K. Tung, ‘Voting Rights for Alien Residents: Who Wants It?’, 19 *International Migration Rev.* (1985) p. 451.

A growing number of other EU member states, by contrast have adopted since the 1970s laws enabling foreigners to participate in the democratic process but have restricted the franchise for permanent resident aliens at the local level.²⁰ Hence, the Netherlands introduced in 1985 the right to vote in municipal councils for foreigners who 'have been resident in the Netherlands for an uninterrupted period of at least five years immediately prior to nomination day and have residence rights'²¹ and a similar piece of legislation was enacted in 2004, after a lengthy parliamentary debate, by Belgium.²² Since 1991, then, two years of permanent residency suffice to aliens for obtaining voting rights at the local level in Finland and this right has now been enshrined even in the text of the Constitution of 2000.²³

On the other hand, a third group of EU states currently do not extend voting rights to non-citizens at the local level but nothing would prevent them from doing so by enacting appropriate legislation. This seems to be, for example, the case of Italy.²⁴ In a series of rulings, in fact, the *Corte Costituzionale*²⁵ declared as purely programmatic (i.e. deprived of any legally binding force) the statutes of several Regions extending voting rights at the local level to non-citizens arguing that the Constitution expressly reserves the exclusive competence in the field of electoral law to the national legislature. The clause of the Constitution which recognizes that all citizens have the right to vote,²⁶ however, has not been inter-

²⁰ Currently, among the 27 member states of the EU 15 extend the franchise at the local level to (at least some classes of) non-EU citizens: Belgium, Denmark, Estonia, Finland, Hungary, Ireland, Lithuania, Luxembourg, The Netherlands, Portugal, Slovenia, Slovakia, Spain, Sweden and the United Kingdom. For a detailed examination of the issue cf. G. Zincone and S. Ardovino, 'I diritti elettorali dei migranti nello spazio politico e giuridico europeo' [Electoral Rights for Migrants in the European Legal and Political Space], *Le Istituzioni del Federalismo* 5 (2004) p. 741.

²¹ Art. B 3(2) Kieswet [*Electoral Act* of 28 September 1989 (consolidated version)].

²² Loi du 19 mars 2004 visant à octroyer le droit de vote aux élections communales à des étrangers, F. 2004-1386.

²³ Sec. 14(2) Const. Finn. Cf. also sec. 26 Kuntalaki [*Local Government Act* No. 365 of 17 March 1995 (consolidated version)].

²⁴ The issue, however, is contested. Compare P. Bonetti, 'Ammissione all'elettorato e acquisto della cittadinanza: due vie dell'integrazione politica degli stranieri' [Extension of the Franchise and Acquisition of Nationality: Two Ways to the Political Integration of Foreigners], in *Federalismi.it* (2003) p. 11 who argues that 'nothing prohibits the extension by ordinary law to non-citizens of the subjective rights granted by the Constitution to citizens' with T. Giupponi, 'Stranieri extracomunitari e diritti politici. Problemi costituzionali dell'estensione del diritto di voto in ambito locale' [Non-EU Citizens and Political rights. Constitutional Problems of the Extension of the Franchise at the Local Level], *Forum di Quaderni Costituzionali* (2006) p. 6.

²⁵ Corte Costituzionale sent. 372/2004 (statute of Region of Tuscany); sent. 379/2004 (statute of Region of Emilia-Romagna) – decisions of 29 Nov. 2004.

²⁶ Art. 48, co. 1 Const. It.

preted by the *Corte Costituzionale* as prohibiting the national Parliament from enacting a bill enfranchising third-country nationals at the local level.

In a last group of member states, on the contrary, voting rights are constitutionally restricted to nationals and any expansion of the franchise to non-citizens requires the burdensome process of constitutional amendment. In Germany, for instance, the attempt by two *Länder* to extend voting rights to foreign residents in local (and *Land*) elections was declared unconstitutional by the *Bundesverfassungsgericht* which, in two joint 1990 decisions,²⁷ affirmed that the constitutional concept of '*Volks*' ought to be interpreted as restricting electoral rights only to German nationals and made clear that any expansion of the franchise to non-citizens required a constitutional change.²⁸ A similar stand was recently adopted also by the Austrian *Verfassungsgerichtshof*, which in 2004 declared a *Land* bill allowing third-country nationals to participate in local elections unconstitutional for violation of the principle of homogeneity of the electoral body.²⁹

The issue of electoral rights for non-citizens is instead addressed in an open-ended way in the framework of the ECHR. Given its importance for the establishment of a well-functioning democracy, Article 3 of the 1st additional Protocol to the ECHR codifies a fundamental right to vote³⁰ stating that the Contracting Parties shall organize free elections 'at reasonable intervals, by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.' The provision talks about the right to vote of 'the people' without explicitly imposing any limitation of the franchise to 'the citizens.' Nevertheless, Article 16 of the ECHR expressly allows for the restriction of the political activities of aliens³¹ and traditionally a wide margin of appreciation has been acknowledged by the European Court of Human Rights (ECtHR) to the Contracting Parties on voting rights issues.³²

²⁷ German Constitutional Court BVerfG 63, 37 (statute of *Land* Schleswig-Holstein); BVerfG 63,60 (statute of *Land* Hamburg) – decisions of 31 Oct. 1990.

²⁸ Cf. G. Neuman, "'We Are the People': Alien Suffrage in German and American Perspective", 13 *Mich. J. Int'l L.* (1992) p. 259 and R. Rubio Marin, 'Equal Citizenship and the Difference that Residence Makes', in M. La Torre (ed.), *European Citizenship: an Institutional Challenge* (Kluwer 1998) p. 201 at p. 210 et seq.

²⁹ Austrian Constitutional Court VfSlg 17.264/2004 [2004].

³⁰ Cf. S. Marks, 'The European Convention on Human Rights and Its "Democratic Society"', *British Ybk Int'l L.* (1995) p. 209 and H.M. ten Napel, 'The European Court of Human Rights and Political Rights: The Need for More Guidance', 5 *EuConst* (2009) p. 464.

³¹ Cf. F. Casolari, 'La partecipazione dello straniero alla vita pubblica locale' [The Participation of Foreigners to Local Public Life], in A. Calamia et al. (eds.), *Immigrazione, Diritto, Dirritti* (Cedam 2011, forthcoming) p. 2.

³² See *Mathieu-Mohin and Clerfayt v. Belgium* [1987], Appl. No. 9267/81; *Sante Santoro v. Italy* [2004], Appl. No. 36681/97; *Py v. France* [2005], Appl. 66289/01. For a structural analysis of the case-law of the ECtHR on Art. 3 Protocol No. 1, see ten Napel, *supra* n. 30, p. 468.

In 1992, however, a separate Convention was negotiated within the Council of Europe with the aim of improving the integration of foreign residents into the local community 'by enhancing the possibilities for them to participate in local public affairs.'³³ Article 6 of the Convention on the Participation of Foreigners in Public Life at the Local Level (CPFPL) requires Contracting Parties to grant aliens who have been resident for five years in a state the right to vote and to stand in local government elections.³⁴ Although the CPFPL 'contains the first unambiguous statement in international law upholding the rights of non-nationals residents to vote in local elections',³⁵ however, only a few EU countries have ratified the treaty so far and some have even adopted reservations and derogations on Article 6, hence depriving the CPFPL of its most significant clause.³⁶

Voting rights for non-citizens have been recognized at the EU level as well.³⁷ Whereas the citizens of the EU member states have *de facto* been endowed with new rights of political representation since the introduction of direct elections by universal suffrage to the European Parliament in 1979,³⁸ it is only with the enactment of the Maastricht Treaty in 1993 that electoral rights for non-citizens have experienced a novel expansion under the concept of EU citizenship.³⁹ Article 17 of the European Community Treaty (TEC) affirmed in fact that 'every person holding the nationality of a Member State [should] be a citizen of the Union. Citizenship of the Union [should] complement and not replace national citizenship.' And today, with a similar but somewhat innovative language,⁴⁰ Article 9 EU Treaty (TEU) – inserted by the Lisbon Treaty – states that 'every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.'

³³ Preamble (Recital 6), CPFPL.

³⁴ Cf. Casolari, *supra* n. 31, p. 5.

³⁵ Shaw, *supra* n. 13, p. 66.

³⁶ Currently only eight states have duly ratified the CPFPL (five of which are member states of the EU): Albania, Denmark, Finland, Iceland, Italy, The Netherlands, Norway and Sweden. Cf. Zincone and Ardevino, *supra* n. 20, p. 743.

³⁷ Cf. H. Lardy, 'The Political Rights of Union Citizenship', 2 *European Pub. L.* 4 (1996) p. 611; M. Fraile Ortiz, 'Citizenship in Europe – Consequences of Citizenship', 19 *European Rev. Pub. L.* 1 (2007) p. 125.

³⁸ Decision 76/787, *OJ* [1976] L278/5. The Decision did not introduce voting rights for the European Parliament elections for citizens of a EU member state residing in another member state. Some EU countries (such as Italy), however, autonomously extended to all residents holding the nationality of another EU member state the right to stand in elections for the European Parliament. See Legge 18 gennaio 1989 n. 9 (G.U. 23 gennaio 1989, n. 18).

³⁹ Cf. F. Goudappel, 'From National Citizenship to European Union Citizenship: The Re-Invention of Citizenship?', 19 *European Rev. Pub. L.* 1 (2007) p. 21; D. Kostakopoulou, 'European Union Citizenship: Writing the Future', 13 *European L.J.* 5 (2007) p. 623.

⁴⁰ See *infra* n. 187.

Among the privileges attached to the possession of EU citizenship electoral rights feature prominently, together with the right of free movement.⁴¹ Citizens of EU member states, in particular, have the right to vote and stand as candidates at both municipal elections and European Parliament elections in their member state of residence, when this differs from their member state of nationality.⁴² According to Article 22(1) of the Treaty on the Functioning of the EU (TFEU) (ex Article 19(1) TEC) 'every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.' Article 22(2) TFEU (ex Article 19(2) TEC) then restates the very same rule with regard to European Parliament elections.

The detailed arrangements and derogations for the exercise of the right to vote and to stand as a candidate in European Parliament and local elections for EU citizens residing in a member state of which they are not nationals are contained in Directives 93/109⁴³ and 94/80,⁴⁴ adopted unanimously by the Council after consulting the European Parliament, as specified by Article 19 TEC (now Article 22 TFEU). As the recitals of the two directives acknowledge, electoral rights are part of the Union's tasks to 'organize, in a manner demonstrating consistency and solidarity, relations between the peoples of the Member States'⁴⁵ and are 'a corollary of the right to move and reside freely enshrined in [the TEC]'.⁴⁶ The aim of these provisions 'is essentially to abolish the nationality requirement to which most Member States currently make the exercise of the right to vote and to stand as a candidate subject.'⁴⁷ Their operation, however, is without prejudice 'for the right to vote and to stand as a candidate in the Member State of which the citizen is a national'.⁴⁸

⁴¹ Cf. G. Bermann, 'European Citizenship at Center-Stage: Introduction', 15 *Columbia J. Eur. L.* (2009) p. 165; S. O'Leary, 'The Relationship Between Community Citizenship and the Protection of Fundamental Rights in Community Law', 32 *CMLRev.* (1995) p. 519. The literature on free movement rights of EU citizens is very broad. Cf. among many: N. Reich, 'The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union', 11 *European L.J.* 6 (2005) p. 675; S. O'Leary, 'Developing an Ever Closer Union Between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship', *Ybk Eur. L.* (2008) p. 167.

⁴² Cf. D. Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights', 15 *Columbia J. Eur. L.* (2009) p. 169 at p. 197 et seq.

⁴³ *OJ* [1993] L329/34.

⁴⁴ *OJ* [1994] L368/38.

⁴⁵ Recital 1, Directive 93/109; Recital 1, Directive 94/80.

⁴⁶ Recital 3, Directive 93/109; Recital 3, Directive 94/80.

⁴⁷ Recital 4, Directive 94/80. See also with a similar language recital 4, Directive 93/109.

⁴⁸ Recital 7, Directive 93/109; Recital 6, Directive 94/80.

On technical grounds,⁴⁹ the two directives specify that EU citizens can exercise the right to vote in the member state of residence if they have expressed the wish to do so simply by producing a formal declaration. Appropriate measures can be adopted by the member states to avoid the individual concerned voting twice and to ensure that he has not been deprived of the right to vote in his home member state. Applications to stand as a candidate, then, are subject to the same conditions applying to candidates who are nationals. To address the specific concerns of some EU countries, nonetheless, the directives recognize that the right to stand for the head of the local government unit can be restricted to nationals.⁵⁰ Voting rights both in local and EU elections may be subject, moreover, to specific residency requirements in those states in which the proportion of non-national citizens of the EU of voting age exceeds one fifth of the electoral population.⁵¹

Therefore, as EU primary and secondary legislation make clear, the progressive steps taken to enhance European political integration have had relevant consequences on the issue of voting rights for non-citizens.⁵² By being awarded the *status* of EU citizens, the nationals of the EU member states have acquired a supplementary voice in the electoral process. Although the EU provisions dealing with voting rights in municipal and European Parliament elections are technically framed as non-discrimination clauses, their effect is to endow second-country nationals with the right to vote and to stand for elections at the local as well as at the supranational level in their country of residence.⁵³ Moreover, unlike the provisions of the CPFPL, these rights are directly effective in all member states (subject to the arrangements and the derogations set out in the directives mentioned above) and prevail over contrasting national law, including constitutional law.

In the end, as this short outline illustrates, the picture of voting rights for non-citizens in the European multilevel architecture is quite intricate. The legislation

⁴⁹ For a detailed analysis and critical assessment of the content of the two directives cf. M. Cartabia, 'Cittadinanza europea' [European Citizenship], in *Enciclopedia Giuridica* (Treccani 1995) vol. 6 *ad vocem* p. 8 et seq. and E. Marias, 'European Citizenship in Action: From Maastricht to the Intergovernmental Conference', in M. La Torre (ed.), *European Citizenship: an Institutional Challenge* (Kluwer 1998) p. 293.

⁵⁰ See Art. 5, Directive 94/80. This provision was specifically adopted to address the concerns of France. Cf. B. Mathieu and M. Verpeaux, *Droit constitutionnel* (PUF 2004) p. 460 and further *infra* n. 89. According to Marias, *supra* n. 49, p. 300, however, such derogation is 'contrary to the case law of the ECJ [...] which prohibits any discrimination based on nationality' (quoting Case C-92/92 *Collins* [1993] ECR I-5145).

⁵¹ See Art. 14, Directive 93/109 (and, with a similar language, Art. 12, Directive 94/80). These provisions were specifically adopted to address the concerns of Luxembourg. Cf. however the critical comments of Kochenov, *supra* n. 42, p. 204.

⁵² Cf. Cartabia, *supra* n. 49, p. 7; Lardy, *supra* n. 37, p. 612; Shaw, *supra* n. 13, p. 25 et seq.

⁵³ Cf. Kochenov, *supra* n. 42, p. 203; Shaw, *supra* n. 13, p. 172. This interpretation has been confirmed by Advocate-General Tizzano in his Opinion in Cases C-145/04 *Spain v. UK* and C-300/04 *Eman & Sevinger* [2006] ECR I-7917 §67-68.

of EU countries differs greatly on the matter and whereas some states enfranchise aliens even for national elections, others deem any extension of the suffrage beyond the citizenry unconstitutional. The international human rights norms provide only limited guidance on this issue: on the one hand, the exclusion of foreigners from the political process is regarded as acceptable by the ECHR; on the other, the CPFPL 'offers a template of incremental steps towards enhancing the political participation rights of non-nationals.'⁵⁴ The EU, however, adds a new layer of complexity⁵⁵ to the picture by recognizing that citizens of each of the EU member states may vote and stand for local and European Parliament elections in their country of residence (even) when this is not their country of nationality. What are the consequences of these complex interactions among domestic and supranational law?

THE CHALLENGES EMERGING FROM THE IMPACT OF SUPRANATIONAL LAW ON STATE LAW

The incremental expansion of the regulation of electoral rights at the supranational level has produced major consequences. In particular, the development in the EU framework of a substantive body of law enfranchising EU citizens who reside in a EU member state of which they are not nationals has significantly increased the protection of the right to vote for non-citizens (second-country nationals) in the European legal space. At the same time, by recognizing that each EU member state must open its electoral process to individuals who do not hold its nationality, EU law 'has given rise to some inconsistencies and disruptions in national franchise systems.'⁵⁶ The open conception of the franchise premised in the grant of electoral rights at the EU level, in fact, challenges and puts under strain national laws and practices in the field of electoral rights.

The new tensions generated by the rising impact of supranational law on the states' electoral regimes emerge chiefly in two areas. On the one hand, EU law calls into question the domestic arrangements that either produce asymmetries in the electoral entitlements of second-country nationals or place constraints on the freedom of EU citizens to take full advantage of the voting rights benefits stemming from EU law. On the other hand, EU law calls into question the domestic arrangements that either fragment the treatment of third-country nationals permanently residing in the EU or persistently exclude them from the franchise, even at the local level. To describe these dynamics I will use hereafter the concept of

⁵⁴ Shaw, *supra* n. 13, p. 65.

⁵⁵ Cf. E. Chiti, 'Consequences of Citizenship in Europe: Are New Layers of Complexities Emerging?', 19 *Eur. Rev. Pub. L.* 1 (2007) p. 99.

⁵⁶ A. Lansbergen and J. Shaw, 'National Membership Models in a Multilevel Europe', 8 *I-Con* (2010) p. 50 at p. 62.

‘inconsistency’ as a catchword that – in my view – well synthesises the challenges and pressures emerging from the overlap and interaction of legal rules in the European multilevel constitutional architecture.

The interplay between supranational and domestic law generates several inconsistencies with regard to the electoral rights of second-country nationals.⁵⁷ As was mentioned in the previous section, EU citizens who reside in an EU country of which they are not nationals are granted in the member state of residence ‘the right to participate in politics by way of elections (both actively and passively) at two of at least three vital levels of political representation.’⁵⁸ By putting flesh on the bones of EU citizenship⁵⁹ and creating a common core of fundamental privileges for the nationals of the EU member states everywhere they reside within the EU,⁶⁰ in fact, EU law has empowered second-country nationals to vote in municipal and supranational elections – but not national elections – in the member state in which they reside and of which they are not nationals.⁶¹

A first complication arises however because, ‘in the absence of a universal Community law definition of “municipal”, the practical application of Art. 19(1) TEC [now Art. 22(1) TFEU] *de facto* results in numerous inconsistencies, since what some Member States view as “municipal” can easily fall within the meaning of “national” in others.’⁶² Thus, whereas Germany and Austria restrict to nationals the right to vote in *Länder* elections,⁶³ the UK allows citizens from other EU states

⁵⁷ Cf. D. Kochenov, ‘Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: an Ignored Link?’, 16 *MJ* 2 (2009) p. 197.

⁵⁸ Kochenov, *supra* n. 57, p. 207.

⁵⁹ Following the well-known expression of S. O’Leary, ‘Putting Flesh on the Bones of EU Citizenship’, 24 *Eur. L. Rev.* (1999) p. 68 (who however was stressing the fundamental role of the ECJ in making the concept of EU citizenship meaningful). Cf. also C. Hilson, ‘What’s in a Right? The Relationship between Community, Fundamental and Citizenship Rights in EU Law’, 29 *Eur. L. Rev.* (2004) p. 636 at p. 649.

⁶⁰ As famously affirmed by Advocate-General Jacobs in his Opinion in Case C-168/91 *Konstantinidis* [1993] ECR I-1191, §47 stating that ‘a Community national [is...] entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the ECHR. In other words, he is entitled to say “*civis europeus sum*” and to invoke that *status* in order to oppose any violation of his fundamental rights.’

⁶¹ Cf. Lardy, *supra* n. 37, p. 626; Fraile Ortiz, *supra* n. 37, p. 128; Shaw, *supra* n. 13, p. 195.

⁶² Kochenov, *supra* n. 57, p. 209. Note that Recital 7, Directive 94/80 acknowledges that ‘the term “municipal election” does not mean the same thing in every Member State’ and Annex I to the Directive contains a list of the local government units which according to the electoral laws of the member states fall within the scope of application of Art. 22(1) TFEU [ex Art. 19(1) TEC].

⁶³ See Austrian Constitutional Court B3113/96, B3760/97 [1997] (holding that the disenfranchisement in the election for the municipality of Vienna of non-Austrian EU citizens residing in Vienna is admissible because the right to vote for local elections in the country of residence granted by EU law does not include the right to vote for a municipality which is also a *Land* in a federal system of government).

to cast a ballot even for the devolved legislatures of Scotland, Wales and Northern Ireland.⁶⁴ It has been affirmed that these differences between national rules result 'in notable discrepancies between the rights enjoyed by European citizens in different Member States, harming the idea of equality among citizens.'⁶⁵ Indeed, it seems that the *status* of EU citizen does not carry equal electoral rights in every member state: rather, its content varies depending from the national law in force.⁶⁶ A second major difficulty, then, is produced by the absence of an EU right to vote in general elections in the member state of residence when coupled with national provisions denying expatriate voting. As indicated, the national level of political representation in the member state of residence is currently left uncovered by EU law.⁶⁷ At the same time, it was already highlighted that the ECHR leaves to the states' discretion whether to extend political rights to non-citizens⁶⁸ and while some European countries (notably, the UK and Ireland) have decided autonomously to enfranchise some classes of foreigners even for parliamentary elections, the vast majority of EU states restrict voting rights for aliens at the local level or exclude them *tout court*.⁶⁹

As long as EU member states allow for expatriate voting, the lack of EU provisions establishing a right to vote in national elections in the member state of residency for the individuals who reside abroad is compensated by the possibility for them to take part in the choice of the legislature in their member state of nationality.⁷⁰ With the aim of emphasizing the link which should exist between an individual and the community mainly affecting his interests, it has been persuasively claimed that 'the country of residence [should be] primarily responsible for the inclusion of its resident population [and that] the country of origin should arguably not bear the obligation to make up for it by allowing emigrants [...] to decide the political future of those who stayed behind.'⁷¹ As unsatisfactory as

⁶⁴ See Scotland Act 1998, Eliz. II c. 46, S. 11(1)(a); Government of Wales Act 1998, Eliz. II c. 38, Schedule 1, S. 10(1); Northern Ireland (Election) Act 1998, Eliz. II c. 12, S. 2(2).

⁶⁵ Kochenov, *supra* n. 57, p. 209.

⁶⁶ It is true that even if EU law had provided a uniform definition of the concept of 'municipal elections' to be applied in all member states, it still would have been possible for EU countries to go beyond the minimum provided by EU law and to recognize broader electoral rights to EU citizens resident. Yet, it appears undeniable that the asymmetries that this situation generates challenge the equality in the right to democratic participation of EU citizens throughout the EU. For an assessment of the problematic recognition of the principle of equality in EU law cf. D. Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal', *Jean Monnet Working Paper* No. 8 (2010).

⁶⁷ Cf. Kochenov, *supra* n. 42, p. 199.

⁶⁸ See *supra* n. 32 et seq.

⁶⁹ See *supra* n. 13 et seq.

⁷⁰ Cf. Shaw, *supra* n. 13, p. 197.

⁷¹ R. Rubio Marin, 'Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Immigrants', 81 *NYU L. Rev.* (2006) p. 117 at p. 130-131.

it may be, nonetheless, the possibility to cast an absentee vote allows the persons concerned to express a voice at least in the election of one national legislature.⁷²

A problem arises, on the contrary, for those EU member states which disenfranchise voters who no longer reside in the state or who have ceased to be resident for a number of consecutive years.⁷³ Certainly, the decision of states to withhold the right to vote from their citizens who live abroad is closely linked to the history and the political culture of the given state.⁷⁴ Countries which have traditionally been a place of emigration, or with large minority groups dislocated outside the national borders, tend to be more favourable to preserving ties with the overseas communities than states of immigration.⁷⁵ Hence, for instance, although Italy does not recognize voting rights for foreign residents even at the local level, the Constitution has recently been amended to ensure greater representation in both chambers of Parliament of the *italiani all'estero*.⁷⁶ The opposite rule exists instead in the UK, where citizens lose their voting rights after fifteen years of continuous residence outside British territory.⁷⁷

The legal or factual impossibility of casting an absentee vote in several EU member states, however, generates an unsatisfactory situation: EU citizens who move to reside in a host member state, while gaining the right to vote at the municipal and supranational level in that state, are disenfranchised for national elections.⁷⁸ This situation seems inconsistent under a plurality of approaches. From an internal market perspective, individuals should not be forced to trade away their right to political representation at the state level in order to exercise free movement rights and participate, their alienage notwithstanding, in the local political life of another member state. Indeed, as it has been written, 'instead of benefiting from both free-movement and national political representation rights, [EU citizens] are facing an impossible choice.'⁷⁹

⁷² Cf. Shaw, *supra* n. 13, p. 197.

⁷³ According to Kochenov, *supra* n. 57, p. 201 currently seven EU countries deny expatriate voting (some, after a number of years abroad): Cyprus, Greece, Ireland, Hungary, Malta, Slovakia and the United Kingdom.

⁷⁴ Cf. Rubio Marín, *supra* n. 71, p. 122.

⁷⁵ This may not always be the case though, and different reasons may explain why several member states restrict expatriate voting while other support it. Cf. *Voting from Abroad: Handbook on External Voting* (IDEA 2007).

⁷⁶ Author's translation: 'Italians living abroad.' See Arts. 1 and 2 Const. It. Rev. Bill 1/2001 (Legge Costituzionale 23 gennaio n. 1) modifying Arts. 56 and 57 Const. It. to ensure that twelve deputies and six senators be elected abroad. See V. Onida, 'Relazione Introduttiva' [Introductory Remarks], in *Atti del Convegno Annuale dell'Associazione Italiana dei Costituzionalisti: 'Lo statuto costituzionale del non cittadino'* (Jovene 2010) p. 3 at p. 6.

⁷⁷ Cf. Kochenov, *supra* n. 57, p. 213.

⁷⁸ Cf. Lardy, *supra* n. 37, p. 622; Kochenov, *supra* n. 56, p. 199.

⁷⁹ Kochenov, *supra* n. 57, p. 223.

From a constitutionalist perspective, as well, this state of affairs is problematic as the national disenfranchisement of EU citizens expatriated in another EU member state is in tension with the new supranational normative arrangement and 'the creation of a new form of citizenship under the auspices of the [EU].'⁸⁰ Since the purpose of EU electoral rights is to allow EU citizens to participate in political life and express their voice in elections even when they reside outside their country of nationality in Europe, the impossibility to cast a vote in general elections 'highlights the [...] tension between national constitutional models and the models of democratic inclusion required by the goal of European citizenship.'⁸¹

The interaction between supranational and domestic law, furthermore, generates a number of inconsistencies also with regard to the electoral rights of third-country nationals permanently residing within the EU. It was highlighted in the previous section that while some EU countries have adopted legislations or ratified international agreements (such as the CPFPL) that enfranchise non-citizens in local elections, many EU member states still restrict suffrage to citizens.⁸² The arguments advanced in these countries to disenfranchise aliens – either based on an ethnic concept of 'people'⁸³ or on a republican ideal of citizenship⁸⁴ – nevertheless, lose much of their strength and become difficult to justify in light of the impact of EU law.⁸⁵ Indeed, 'once a Member State has opened its polling stations to Union citizens who lack its legal citizenship, what principled ground can it advance for refusing to consider the claims of other non-[]citizens to be admitted?'⁸⁶

It is true that the provisions granting voting rights to EU citizens in their country of residence introduced by the Maastricht Treaty were of such significance that constitutional amendments were required in a number of member states to ratify the pact.⁸⁷ Hence, for example, Germany expressly introduced a clause allowing EU citizens to vote in local elections in its Basic Law⁸⁸ and France did the same in Article 88-3 of its Constitution (where specific arrangements were also made to ensure that foreigners would not be allowed to 'exercer les fonctions de maire ou d'adjoint ni participer à la désignation des électeurs sénatoriaux et à

⁸⁰ S. Choudhry and C. Saunders, 'Symposium on Citizenship: Foreword', 8 *I-Con* (2010) p. 6.

⁸¹ Lansbergen and Shaw, *supra* n. 56, p. 62.

⁸² See *supra* n. 13 et seq.

⁸³ Cf. E. Horvath and R. Rubio Marin, "'Alles oder Nichts'? The Outer Boundaries of the German Citizenship Debate', 8 *I-Con* (2010) p. 72 at p. 87.

⁸⁴ Cf. E. Lefebvre, 'Republicanism and Universalism: Factors of Inclusion or Exclusion in the French Concept of Citizenship', 7 *Citizenship Studies* 1 (2003) p. 15.

⁸⁵ Cf. Lardy, *supra* n. 37, p. 627.

⁸⁶ Lardy, *supra* n. 14, p. 99.

⁸⁷ Cf. Cartabia, *supra* n. 49, p. 9; Fraile Ortiz, *supra* n. 37, p. 128.

⁸⁸ See Art. 28 *Grund Gesetz*

l'élection des sénateurs').⁸⁹ Still, logically speaking, by extending the franchise to certain non-citizens (second-country nationals), these countries have compromised the claims in favour of the purity of the electoral body and opened the door for the extension of the suffrage to other classes of non-citizens.⁹⁰

In addition, on the basis of the provisions of the former Title V, TEC Directive 2003/109 on the *status* of third-country nationals who are long-term residents was adopted in 2003.⁹¹ This framework legislation extends to third-country nationals many of the rights enjoyed by EU citizens (although with some exceptions, including voting rights),⁹² on the assumptions that 'both experience similar forms of dislocation when they reside in a State where they lack the nationality.'⁹³ Even though the directive sets only a minimum standard that can be overcome by more favourable national provisions, 'the principle underpinning this [act] is that domicile generates entitlements both in the forms of equalization of the treatment of third country nationals with nationals of the host Member State in socio-economic life and enhanced protection against expulsion as well as rights of mobility within the EU.'⁹⁴

In light of these developments at the EU level, therefore, the disenfranchisements of permanent resident third-country nationals in some EU member states generates asymmetries across Europe:⁹⁵ citizens of non-EU countries who reside for five years in a EU member state are automatically entitled to obtain long-term residence *status*; they enjoy a common core of rights; but, they can vote in local elections only if they happen to reside in a EU state which accords such right.⁹⁶ Although certainly EU law only sets a minimum standard for the treatment of aliens, it appears that greater coordination among the member states would diminish the constitutional tensions that emerge from this account.⁹⁷ As of today,

⁸⁹ The constitutional revision was required by the decision of the Conseil Constitutionnel 92-308 DC (*Traité sur l'Union Européenne*), §26-27. See also the Decision 92-312 DC (*Loi autorisant la ratification du Traité sur l'Union Européenne*). In the literature cf. Mathieu and Verpeaux, *supra* n. 50, p. 318.

⁹⁰ Cf. Kochenov, *supra* n. 42, p. 227; Horvath and Rubio Marin, *supra* n. 83, p. 87.

⁹¹ OJ [2004] L16/44. In the literature cf. D. Kostakopoulou, 'Integrating' Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms', 8 *Columbia J. Eur. L.* (2002) p. 181.

⁹² Cf. S. Besson and A. Utzinger, 'Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora's Box', 13 *European L.J.* 5 (2007) p. 573 at p. 580; Goudappel, *supra* n. 39, p. 41.

⁹³ Shaw, *supra* n. 13, p. 236.

⁹⁴ Kostakopoulou, *supra* n. 91, p. 198.

⁹⁵ Cf. Lardy, *supra* n. 37, p. 627; Kochenov, *supra* n. 42, p. 228.

⁹⁶ Cf. Besson and Utzinger, *supra* n. 92, p. 580; Kostakopoulou, *supra* n. 39, p. 643 et seq.

⁹⁷ Cf. Shaw, *supra* n. 13, p. 232.

however, it has to be regretted 'that there is no common approach in all EU Member States to this issue.'⁹⁸

To sum up, a number of tensions and challenges have emerged in the field of electoral rights for non-citizens in Europe because of the overlap and interplay between national and supranational law.⁹⁹ Whereas, historically, the European states were sovereign in deciding the boundaries of their electorates, the development at the supranational level of a substantive body of laws extending voting rights to EU citizens residing outside their country of nationality has placed new limits on the autonomy of the EU member states and put under additional pressure those national laws and practices which constrain the electoral entitlements of second-country nationals and *tout court* exclude from the franchise third-country nationals.¹⁰⁰ Are the inconsistencies arising from the European multi-level regulation of electoral rights for non-citizens a *sui generis* phenomenon?

ELECTORAL RIGHTS FOR NON-CITIZENS IN THE US FEDERAL SYSTEM

The complex dynamics that have emerged in Europe because of the overlap of different norms on citizenship and voting rights, while certainly peculiar in some respect, are not unique.¹⁰¹ Rather, comparable features seems to characterize the 'federal experiences of countries [...] founded in their respective beginnings on a voluntary association of their Member States.'¹⁰² In a comparative perspective, it is possible to argue, albeit with several caveats, that the tensions and challenges arising in the field of electoral rights for non-citizens in the European multilevel architecture are analogous to the dynamics at play in those federal systems in which the competence over electoral rights and the power to define the boundaries of the polity have been the object of continuous contestation between the federation and its constituent states.¹⁰³

⁹⁸ Kochenov, *supra* n. 42, p. 229.

⁹⁹ Cf. Lansbergen and Shaw, *supra* n. 56, p. 62.

¹⁰⁰ Cf. also M. Aziz, *The Impact of European Rights on National Legal Cultures* (Hart 2004), p. 67.

¹⁰¹ On the methodological advantages of rejecting a *sui generis* approach to the study of Europe in favour of a comparative approach (especially with the US federal architecture) cf. in general M. Cappelletti et al., 'General Introduction', in M. Cappelletti et al. (eds.), *Integration Through Law: Europe and the American Federal Experience, Volume 1, Book 1* (de Gruyter 1986) p. 3 and R. Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (Oxford UP 2009).

¹⁰² C. Schönberger, 'European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism', 19 *European Rev. Pub. L.* 1 (2007) p. 61 at p. 64.

¹⁰³ Cf. V. Lippolis, *La cittadinanza europea [European Citizenship]* (Il Mulino 1994) p. 75 and J. Bierbach, 'Who's Afraid of Union Citizenship', 5 *EuConst* (2009) p. 517 reviewing the book of C. Schönberger, *Unionsbürger, Europas föderales Bürgerrecht in vergleichender Sicht* (Mohr Siebeck 2005).

This appears to be especially the case for the US.¹⁰⁴ In the US federal experience, in fact, the scope of electoral rights for non-citizens has been historically conditioned by the interplay between state and federal rules and by the competition between a local and a transnational vision of citizenship and the polity. Whereas in the early phase of the federation, the constituent states were largely independent in defining who their peoples were and in regulating access to the franchise (both for state and federal elections), over time the federal government was granted increasing powers in the field of electoral rights to remedy perceived shortcomings in the regulation of the right to vote and to ensure greater consistency, especially in the electoral entitlements for citizens of the US moving from one state to the other of the federation.

From the methodological point of view,¹⁰⁵ therefore, a comparison of the constitutional experience of the US federal system may be particularly useful in order to understand the dynamics and the developments at play in the field of citizenship and voting rights in Europe.¹⁰⁶ Before undertaking this assessment, however, it is worth clarifying as a caveat that a comparison of the regulation of electoral rights for non-citizens in the European multilevel and the US federal systems neither implies that the two systems are identical nor suggests that they will inevitably evolve in the same way.¹⁰⁷ As scholars of comparative federalism have correctly pointed out, 'a comparison does not have to be based on the assumption of a complete identity of development. Its task is not to predict the future but to enlighten the present.'¹⁰⁸

At the same time the US federal system and the European multilevel architecture share an important structural analogy: they both feature a pluralist, heterarchical constitutional arrangement for the protection of fundamental rights, with

¹⁰⁴ Cf. V. Jackson, 'Citizenship and Federalism', in A. Aleinikoff and D. Klusmeyer (eds.), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace 2001) p. 127.

¹⁰⁵ For an overview of the rules governing case selections and their justification in the field of comparative constitutional law cf. the systematic work of R. Hirshl, 'The Question of Case Selection in Comparative Constitutional Law', 53 *Am. J. Comp. L.* (2005) p. 125.

¹⁰⁶ For a comparison of citizenship, free movements and social rights in the US and Europe cf. instead A. Van der Mei, 'Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law', 19 *Ariz. J. Int'l & Comp. L.* (2002) p. 803; Francesca Strumia, 'Citizenship and Free Movement: European and American Features of a Judicial Formula for Increased Comity', 12 *Columbia J. Eur. L.* (2006) p. 713.

¹⁰⁷ On the caveats that are necessary when undertaking a comparison of the EU with the US cf. D. Elazar, 'The United States and the European Union: Models for Their Epochs', in R. Howse and K. Nicolaidis (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford UP 2001) p. 31 and G. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', 94 *Columbia L. Rev.* (1994) p. 332.

¹⁰⁸ Schönberger, *supra* n. 102, p. 65.

rights being simultaneously recognized at the state and federal/supranational levels and adjudicated by a plurality of institutions operating in these multiple layers.¹⁰⁹ Hence, assessing in a comparative perspective how the issue of voting rights for non-citizens has historically been dealt with in the US constitutional system raises useful insights to understand the current European challenges and provides some cautionary tales to appreciate the possible scenarios that might open up in the future in the European multilevel human rights system.¹¹⁰

The US Constitution of 1787 'originally left voting rights, even in federal elections, in the hands of the states.'¹¹¹ Consistent with the idea of a republican compound of states and peoples,¹¹² the Philadelphia Constitutional Convention rejected the hypothesis of establishing uniform electoral rules at the federal level,¹¹³ specifying instead in Art. I, § 2 cl. 1 of the Constitution that the members of the House of Representatives would be chosen by the 'people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.' Since the Senate, until the adoption of the 17th Amendment in 1913, was also elected directly by the state legislatures, for all purposes this arrangement meant that it was for the states to decide who should be enfranchised, and that those eligible to vote at the state level were also able to cast ballots for the federal government.¹¹⁴

Furthermore – whereas the Constitution made possession of US citizenship a condition to hold office in Congress and as US President¹¹⁵ and Art. I, § 8, cl. 2 empowered Congress to make 'a uniform rule of naturalization' – the original pact

¹⁰⁹ Cf. A. Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford UP 2009) p. 70; D. Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States', in J. Dunoff and J. Trachtman (eds.), *Ruling the World: Constitutionalism, International Law and Global Governance* (Cambridge UP 2009) p. 348. For further references cf. also Fabbrini, *supra* n. 7.

¹¹⁰ Cf. E.A. Young, 'Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism', 77 *NYU L. Rev.* (2002) p. 1612.

¹¹¹ G. Neuman, *Strangers to the Constitution. Immigrants, Borders and Fundamental Law* (Princeton UP 1996) p. 63.

¹¹² Cf. L. Friedman Goldstein, *Constituting Federal Sovereignty. The European Union in Comparative Context* (Johns Hopkins UP 2001) and J. Goldsworthy, 'The Debate about Sovereignty in the United States: A Historical and Comparative Perspective', in N. Walker (ed.), *Sovereignty in Transition* (Hart 2003) p. 423.

¹¹³ Cf. Neuman, *supra* n. 111, p. 63.

¹¹⁴ Cf. V. Harper-Ho, 'Noncitizen Voting Rights: The History, the Law and Current Prospects for Change', 18 *Law & Inequality* (2000) p. 271 at p. 287; E. Brozovich, 'Prospects for Democratic Change: Non Citizen Suffrage in America', 23 *Hamline J. Pub. L. & Pol'y* (2002) p. 403 at p. 411.

¹¹⁵ Cf. E. Maltz, 'Citizenship and the Constitution: A History of the Supreme Court's Alienage Jurisprudence', 28 *Ariz. St. L.J.* (1996) p. 1135.

‘contained no definition of national citizenship.’¹¹⁶ In this context, it was up to each of the constituent states to define the boundaries of its citizenry (and, by implication, of the federal polity) and to accord to its members a series of local entitlements, such as political rights. Art. IV, § 2 cl. 1, however – rescuing a provision formerly codified in the Articles of Confederation¹¹⁷ – affirmed that ‘the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,’ with the purpose of ensuring that ‘the citizens of the states ceased to be foreigners for the other states of the new Union without becoming their citizens.’¹¹⁸

The fact that – for almost three-quarters of a century since the foundation of the US federation – the states had almost total control on the rights of political participation meant that the enfranchisement of non-citizens varied significantly across the US.¹¹⁹ On the one hand, several states introduced strict residency requirements aiming at preventing citizens of other US states (analogous to those called ‘second-country nationals’ in EU parlance) who had recently moved in the state from participating in elections there.¹²⁰ On the other hand, in other states voting rights were even extended to resident aliens (‘third-country nationals’):¹²¹ ‘as a chapter in the history of American federalism, the period of alien suffrage reflected a conception of states as sovereign political entities. The states with alien suffrage allowed non-US citizens to participate in voting at all levels of American government, thereby turning them, explicitly, into “citizens” of the state itself.’¹²²

The original US constitutional arrangement began to reveal its limitations by the half of the 19th century in connection with the thorny question of slavery. Since the 1770s a number of Northern states had granted state citizenship and voting rights to freed slaves,¹²³ and it had remained largely unsettled whether the slave-states could challenge the ‘privileges and immunities’ granted to freed slaves by free-states.¹²⁴ In its infamous *Dred Scott* decision,¹²⁵ however, the US Supreme

¹¹⁶ A. Bickel, ‘Citizenship in the American Constitution’, 15 *Ariz. L. Rev.* (1973) p. 369. Bear in mind that in the US, by contrast to the EU, the term ‘national’ refers to the federal level of government.

¹¹⁷ Cf. Lippolis, *supra* n. 103, p. 76.

¹¹⁸ Schönberger, *supra* n. 102, p. 68.

¹¹⁹ Cf. J. Raskin, ‘Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage’, 141 *U. Penn. L. Rev.* (1993) p. 1391 at p. 1395.

¹²⁰ Cf. D. Cocanower and D. Rich, ‘Residency Requirement for Voting’, 12 *Ariz. L. Rev.* (1970) p. 477 at p. 484.

¹²¹ Cf. Harper-Ho, *supra* n. 114, p. 273; Brozovich, *supra* n. 114, p. 408.

¹²² Raskin, *supra* n. 119, p. 1397.

¹²³ Cf. P. Karlan, ‘Ballots and Bullets: The Exceptional History of the Right to Vote’, 71 *U. Cincinn. L. Rev.* (2003) p. 1345 at p. 1348.

¹²⁴ Cf. Lippolis, *supra* n. 103, p. 80.

¹²⁵ *Dred Scott v. Sandford*, 19 US (How.) 393 (1857). For a detailed analysis of the facts preceding the case, the ruling of the Court and its effects see P. Finkelman, *Dred Scott v. Sandford. A Brief History with Documents* (Bedford 1997).

Court destroyed this fragile compromise by stating that ‘negro[es] of African descent, [...] who were brought into this country and sold as slaves’¹²⁶ could never be part of the US polity. The decision of the Court contributed to the explosion of the Civil War, which eventually – after the victory of the North – led to the abolition of slavery and to the adoption of two constitutional amendments that profoundly reshaped the relationship between the states and the federal government in the field of citizenship and electoral rights.¹²⁷

The 14th Amendment – by establishing that ‘all persons born or naturalized in the US [...] are citizens of the US and of the state wherein they reside’ and by prohibiting the states from abridging the privilege and immunities of the citizens of the US or depriving them from the due process and the equal protection of the laws – ‘made state citizenship a matter of federal constitutional law, defining it simply as residence in a state’¹²⁸ and simultaneously mandated the application of a federal standard of fundamental rights protection throughout the US.¹²⁹ The 15th Amendment – by barring the States from denying or abridging the right to vote of US citizens on ‘account of race, color, or previous condition of servitude’ and by granting to Congress the power to enforce the provision by appropriate legislation – ‘marked the first time since the constitutional Convention in Philadelphia that the national government of the US grappled directly and extensively with the issues of voting rights.’¹³⁰

Yet, if the Reconstruction amendments sanctioned the involvement of the federal government in the field of electoral rights, they did not effectively prevent many states from continuing to disenfranchise large parts of their population throughout the Jim Crow era.¹³¹ At the same time, in the 1904 case *Pope v. Williams*,¹³² the US Supreme Court confirmed that the states still enjoyed

¹²⁶ *Dred Scott*, at 404.

¹²⁷ Compare B. Ackerman, *‘We the People’. Volume 2: Transformations* (Harvard UP 1998) and A.R. Amar, *The Bill of Rights: Creation and Reconstruction* (Yale UP 2000).

¹²⁸ P. Schuck, ‘Citizenship in Federal Systems’, 48 *Am. J. Comp. L.* (2000) p. 195 at p. 223.

¹²⁹ Cf. W. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Harvard UP 1988).

¹³⁰ A. Keyssar, *The Right to Vote* (Basic Books 2000) p. 94.

¹³¹ Since the purpose of this work is to examine the regulation in the US of the right to vote for non-citizens (‘second-country nationals’ or ‘third-country nationals’) I will not address here the dramatic history of domestic disenfranchisement of African-Americans and other minority groups who, despite clearly being citizens of the US and of the state in which they resided, were deprived of their electoral rights at home because of their racial origin. It has to be acknowledged, however, that the struggle to solve the problem of African-American disenfranchisement has been the driving force of electoral rights reform in the US. Cf. L. Friedman, *Law in America* (Modern Library 2002) p. 69.

¹³² *Pope v. Williams* 193 US 621 (1904) (upholding a state law that required a US citizen who enters the state to make a declaration of his intention of becoming a citizen of the state before he can be registered as a voter)

autonomy in regulating the suffrage of 'second-country nationals', since 'the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.'¹³³ States, moreover, also retained the power to enfranchise non-US citizens for local purposes and the Supreme Court upheld this practice in *Minor v. Happerset*.¹³⁴ by the 1920s, however, the tradition virtually disappeared.¹³⁵

The tilt 'toward the nationalization of the right to vote'¹³⁶ only occurred in the US during the 20th century. The 19th, 24th and 26th Amendments to the US Constitution successively forbade the states from denying or abridging the right to vote of US citizens by reason of sex, failure to pay poll taxes or age.¹³⁷ Moreover, finally relying on the enforcement powers set by the 15th Amendment, in the 1950s Congress started to enact a series of Voting Rights Acts aiming at ensuring effective participation at the polls to all US citizens.¹³⁸ The federal judiciary then played a 'central role'¹³⁹ in authorizing and supporting 'what amounted to a federal takeover of state voting laws':¹⁴⁰ the Supreme Court upheld the constitutionality of the Voting Rights legislation¹⁴¹ and subjected to strict scrutiny under the equal protection clause of the 14th Amendment all restrictive voting qualifications set up by the states.¹⁴²

¹³³ *Id.*, at 632.

¹³⁴ *Minor v. Happerset* 88 US 162 (1874) (affirming that citizenship has not in all cases been made a condition precedent to enjoy the right to vote).

¹³⁵ Cf. Raskin, *supra* n. 119, p. 1416; Harper-Ho, *supra* n. 114, p. 282.

¹³⁶ Keyssar, *supra* n. 130, p. 166.

¹³⁷ Cf. Raskin, *supra* n. 110, p. 1425 et seq.

¹³⁸ Cf. also G. Gunther and K. Sullivan, *Constitutional Law*, 13th edn. (Foundation Press 1997) p. 984.

¹³⁹ P. McCray, 'Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990', 5 *Penn. J. Const.L.* (2003) p. 665 at p. 667.

¹⁴⁰ Keyssar, *supra* n. 130, p. 266.

¹⁴¹ See *South Carolina v. Katzenbach* 383 US 301 (1966) (upholding the Voting Rights Act 1965 as a valid mean to carry out the commands of the 15th Amendment); *Harper v. Virginia Board of Elections* 383 US 663 (1966) (upholding the provision of the Voting Rights Act 1965 prohibiting polling taxes as condition to vote); *Katzenbach v. Morgan* 384 US 641 (1966) (upholding the provision of the Voting Rights Act prohibiting English-language literacy tests as conditions to vote). On this significant page of the US Supreme Court's history cf. A. Bickel, 'The Voting Rights Cases', *S.Ct. Rev.* (1966) p. 79.

¹⁴² See *Baker v. Carr* 369 US 186 (1962) (reviewing apportionment of State legislative seats in Tennessee under the equal protection clause of the 14th Amendment); *Reynolds v. Sims* 377 US 533 (1964) (striking down the Alabama districting system for state legislature). For a more recent overview of the case-law of the US Supreme Court in the field of electoral law cf. P. Karlan, 'The Supreme Court's Voting Rights Trilogy', *S.Ct. Rev.* (1993) p. 245.

The assumption by the federal government of 'full responsibility'¹⁴³ in guaranteeing voting rights had major consequences for the enfranchisement of US citizens residing in another state of US. In *Dunn v. Blumstein*¹⁴⁴ the US Supreme Court struck down a Tennessee law, requiring residency in the state for one year as a prerequisite for voting, for violating the 14th Amendment's equal protection clause and the right to interstate travel.¹⁴⁵ According to the Court, indeed, the state's durational residency requirements 'impermissibly condition[ed] and penalize[d] the right to travel by imposing their prohibitions on only those [US citizens] who have recently exercised that right [and...] forc[ing] a person who wishes to travel and change residence to choose between travel and the basic right to vote.'¹⁴⁶ Denying that the states could have a compelling interest in preserving 'the purity of the ballot box'¹⁴⁷ the Court made clear that the right of participation in the democratic process ought to be guaranteed to US citizens anywhere they moved in the US.

On the contrary, the expansion of federal competences in the field of electoral law did not directly benefit aliens ('third-country nationals') as the power to enfranchise non-US citizens has remained within the purview of the US states.¹⁴⁸ Nevertheless, although recent trends have highlighted a renewed interest for immigrant suffrage at the local level,¹⁴⁹ the issue of voting rights for non-US citizens was mainly dealt with indirectly through the adoption by Congress of uniform federal naturalization rules that facilitate the acquisition of US citizenship – and with it of electoral rights.¹⁵⁰ Whereas citizenship has always been ensured in the US to second-generation immigrants by the application of unconditional *jus soli*,¹⁵¹

¹⁴³ Keyssar, *supra* n. 130, p. 256.

¹⁴⁴ *Dunn v. Blumstein* 405 US 330 (1972). See also *Carrington v. Rush* 380 US 89 (1965) (striking down a Texas law that prevented members of the military stationed in the state from establishing residence there for electoral purposes).

¹⁴⁵ On the right of interstate travel see the decisions of the US Supreme Court in *Edwards v. California* 314 US 160 (1941) (declaring unconstitutional a California law prohibiting the bringing of non-resident indigent persons into the state) and *Shapiro v. Thompson* 349 US 618 (1969) (declaring unconstitutional a Connecticut law reserving welfare benefits only to citizens who have resided in the state for one year).

¹⁴⁶ *Dunn*, at 342.

¹⁴⁷ *Id.*, at 345.

¹⁴⁸ Cf. Raskin, *supra* n. 119, p. 1419.

¹⁴⁹ Cf. M. Varsanyi, 'The Rise and Fall (and Rise?) of Non-Citizen Voting: Immigration in the Shifting Scale of Citizenship and Suffrage in the United States', 9 *Space and Polity* 2 (2005) p. 113.

¹⁵⁰ Cf. Neuman, *supra* n. 28, p. 310; Rubio Marin, *supra* n. 28, p. 216. Cf. also P. Schuck, 'The Treatment of Aliens in the United States', in P. Schuck and R. Munoz (eds.), *Paths to Inclusion* (Berghahn Books 1998) p. 203 at p. 237.

¹⁵¹ Even before the introduction of the 14th Amendment, which constitutionalized the principle that people born in the US are US citizens. Cf. P. Weil, 'Access to Citizenship: a Comparison of Twenty-Five Nationality Laws', in A. Aleinikoff and D. Klusmeyer (eds.), *Citizenship Today: Global*

since 1952 requirements for naturalization have been eased and made non-discriminatory for all permanent resident aliens.¹⁵²

In sum, a short assessment of the regulation of electoral rights for non-citizens in the US federal system reveals an evolving pattern. Whereas the US states were originally sovereign in deciding the boundaries of the suffrage, a series of constitutional transformations establishing the primacy of federal citizenship over state citizenship¹⁵³ and constraining states' autonomy in the field of electoral rights¹⁵⁴ have step by step expanded the competence of the federal government in the regulation of the franchise. As a result, some of the tensions and inconsistencies that had characterized the US regime of electoral rights for non-citizens have been solved. Today, especially, US citizens can move from one US state to another and participate in all state and federal elections held in their state of residency under conditions of equality.¹⁵⁵ No federal standard, instead, provides for the enfranchisement of non-US citizens, but alien residents can easily acquire US citizenship through a uniform federal procedure and thus become part of the US electorate.¹⁵⁶ What lessons can we draw from a comparison between the US and the European electoral rights regimes?

THE PRESENT AND FUTURE OF THE EUROPEAN ELECTORAL RIGHTS REGIME IN COMPARATIVE CONTEXT

A comparative assessment of the US federal experience reveals several similarities in the constitutional dynamics at play in the US and Europe. Firstly, both in the US and in Europe the regulation of electoral rights for non-citizens has been characterized by tensions and challenges: in the US, the interplay between state and federal rules historically produced contestations over the conception of the

Perspectives and Practices (Carnegie Endowment for International Peace 2001) p. 17 at p. 20. The Supreme Court confirmed that all persons born in the US are US citizens in *US v. Wong Kim Ark* 169 US 649 (1898) (denying that the nationality and the racial origin of the parents may deprive a child born on US soil from US citizenship). Cf. T. Heller, 'Changes and Convergence: Is American Immigration Still Exceptional?', in A. Kondo (ed.), *Citizenship in a Global World: Comparing Citizenship Rights for Aliens* (Palgrave 2001) p. 196.

¹⁵² See Immigration and Nationality Act 1952, 8 U.S.C. 1427. In the literature see also P. Schuck, 'The Re-Evaluation of American Citizenship', in C. Joppke (ed.), *Challenge to the Nation-State* (Oxford UP 1998) p. 191.

¹⁵³ Cf. Lippolis, *supra* n. 103, p. 83-84.

¹⁵⁴ Cf. Keyssar, *supra* n. 130, p. 282.

¹⁵⁵ Cf. A. Aleinikoff, 'American Citizenship: an Introduction', 5 *Citizenship Studies* 1 (2001) p. 5.

¹⁵⁶ Cf. G. Neuman, 'Nationality Law in the United States and Germany: Structure and Current Problems', in P. Schuck and R. Munoz (eds.), *Paths to Inclusion* (Berghahn Books 1998) p. 247 at p. 254.

polity and the meaning of the right to vote analogous to those experienced in contemporary Europe. Secondly, both in the US and Europe, electoral rights regimes appear to evolve incrementally, with inconsistencies surfacing and being addressed over a long time span and through the concerted action of a plurality of institutions. Hence, in the US, despite the enactment of the 14th and 15th Amendments in the 1860s, it was only in the 1960s that the US Congress and the federal courts took the decisive step to ensure that the right to vote for US citizens would not be jeopardized when they travelled from one state to another of the US.¹⁵⁷

At the same time, however, major differences remain. Beside the peculiar link that exists in the US between electoral reforms and the struggle for African-American enfranchisement,¹⁵⁸ there are structural diversities between the US and the European systems that can hardly be minimized. For instance, whereas in Europe member states are still sovereign in defining their nationality laws, the US Constitution – as the basic text of a new-founded community made of immigrants – originally gave Congress the power to adopt a uniform naturalization rule, significantly changing the framework in which the demands for alien suffrage took place.¹⁵⁹ In addition, a series of subsequent developments have transformed the US voting rights system in a way still unknown to Europe. Constitutional amendments, legal reforms and a stronger political awareness of the need to address the challenge of voting rights as a single national democratic problem eventually led to the establishment of a more consistent political rights regime in the US.¹⁶⁰

It is difficult to predict whether Europe will experience a comparable development. A number of legal changes have recently taken place in Europe, mainly as a result of the jurisprudential and legal transformations occurring in the EU legal order. On the one hand, the EU Court of Justice (ECJ) and the ECtHR have expanded their case-law in the field of electoral rights for non-citizens. On the

¹⁵⁷ Cf. Keyssar, *supra* n. 130, p. 166. See also F. Michelman, 'Conceptions of Democracy in American Constitutional Argument: Voting Rights', 41 *Florida L. Rev.* (1989) p. 443 at p. 458.

¹⁵⁸ On the struggle for African-American enfranchisement in the South of the US cf. R. Valelly, *The Two Reconstructions* (Chicago UP 2004) and the discussion *supra* at n. 131.

¹⁵⁹ Cf. Neuman, *supra* n. 28, p. 310 who argues that the existence of a federal naturalization rule 'available as of right [...] probably explains why so little effort has been made [...] to revive alien suffrage in the [US].' Although inferring a direct causality in the social sciences is always difficult, it seems plausible to argue that the relative ease with which foreigners can become US citizens changes the stakes of alien suffrage and dilutes some of the tensions that we have seen characterizing the voting rights regime for third-country nationals in Europe. See also L. Gilbert, 'National Identity and Immigration Policy in the US and the European Union', 14 *Columbia J. Eur. L.* (2008) p. 99 at p. 138.

¹⁶⁰ Cf. Keyssar, *supra* n. 130, p. 283. See also E. Meehan, 'The Constitutions of Institutions', in R. Howse and K. Nicolaidis (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford UP 2001) p. 403.

other, the coming into force of the Lisbon Treaty has introduced some discrete innovations in the discipline of EU citizenship which could prospectively affect the regulation of voting rights for EU citizens. Despite their potential future relevance, nevertheless, these transformations do not yet evidence an evolutionary trend in Europe akin to that experienced in the US. From this point of view, additional reforms in EU law would appear to be required to address the main challenges and inconsistencies that afflict the regulation of voting rights for non-citizens in the European multilevel architecture.

The issue of the disenfranchisement of EU citizens was at the heart of several decisions of both the ECtHR and the ECJ.¹⁶¹ Already in *Matthews*¹⁶² the ECtHR had to decide whether the UK Act for the election of the European Parliament, by depriving a British citizen residing in Gibraltar of the right to vote, violated Article 3 of the 1st additional Protocol of the ECHR.¹⁶³ The ECtHR declared the case admissible, arguing that the UK was responsible under the ECHR 'for securing the rights guaranteed by Art. 3 of Protocol No. 1 in Gibraltar regardless of whether the elections were purely domestic or European.'¹⁶⁴ On the merits, it found that the European Parliament contributed to the achievement of the principle of 'effective political democracy'¹⁶⁵ protected by the ECHR and that it was therefore for the ECtHR 'to determine in the last resort whether the requirements of Protocol No. 1 ha[d] been complied with.'¹⁶⁶ While recognizing that 'the State enjoys a wide margin of appreciation'¹⁶⁷ on electoral issues, then, the ECtHR ruled that 'in the circumstances of the present case, the very essence of the applicant's right to vote [...] was denied.'¹⁶⁸

Similarly, in *Aruba*,¹⁶⁹ the ECJ subjected to strict scrutiny a Dutch law disenfranchising Dutch nationals residing in Aruba (a constituent country of the Kingdom of the Netherlands not subject to EU law) from the elections for the European Parliament.¹⁷⁰ Since the petitioners could 'rely on the rights conferred

¹⁶¹ Cf. Shaw, *supra* n. 13, p. 168 et seq. Cf. also J. Shaw, 'The Political Representation of Europe's Citizens: Developments', 4 *EuConst* (2008) p. 162.

¹⁶² *Matthews v. United Kingdom* [1999], Appl. No. 24833/94.

¹⁶³ The literature on the decision is wide and mostly focusing on the issue of the authority of the ECtHR to review a measure adopted by a Contracting Party of the ECHR in his capacity as a member state of the EU. Cf. I. Canor, 'Primus Inter Pares. Who is the Ultimate Guardian of Human Rights in Europe', 25 *EHRR* 1 (2000) p. 3. For an analysis of the electoral issues involved in the decision cf. H. Schermers, 'Case Note: *Matthews v. UK*', 36 *CMLRev.* (1999) p. 673.

¹⁶⁴ *Matthews*, at §35.

¹⁶⁵ *Id.*, at §42.

¹⁶⁶ *Id.*, at §63.

¹⁶⁷ *Id.*, at §64.

¹⁶⁸ *Id.*, at §65.

¹⁶⁹ Case C-300/04 *Eman & Sevinger (Aruba)* [2006] ECR I-8055.

¹⁷⁰ Cf. Shaw, *supra* n. 13, p. 177 et seq.

on citizens of the EU,¹⁷¹ the ECJ addressed the question whether ‘a citizen of the EU resident or living in an overseas territory has the right to vote and to stand as a candidate in elections to the European Parliament,’¹⁷² with the understanding that ‘the definition of the persons entitled to vote and to stand for election falls within the competence of each Member State [but] in compliance with Community law.’¹⁷³ Given that the Dutch law unreasonably withheld voting rights for Dutch nationals residing in Aruba while allowing expatriate citizens residing in other non-member countries to vote for the European Parliament, however, the ECJ concluded that the Netherlands had unduly violated the general ‘principle of equal treatment or non-discrimination.’¹⁷⁴

At the same time, in *Gibraltar*¹⁷⁵ (a case decided on the same day of *Aruba* and that had originated as a follow up to *Matthews*)¹⁷⁶ the ECJ upheld the decision of a member state to extend the franchise for the European Parliament to third-country nationals.¹⁷⁷ Whereas Spain complained that the UK – in amending its electoral Act to comply with *Matthews* – had violated EU law by extending the franchise for the European Parliament to non-EU citizens, i.e., qualified Commonwealth citizens, resident in Gibraltar, the ECJ rejected the argument that EU primary law excluded ‘a person who is not a citizen of the EU, such as a qualified Commonwealth citizen resident in Gibraltar, from being entitled to the right to vote and stand for election’¹⁷⁸ to the European Parliament. The ECJ, on the contrary, affirmed that the electoral ‘rights recognised by the Treaty are [not necessarily] limited to citizens of the EU.’¹⁷⁹

Taken together these decisions evidence a rising role of the ECJ and the ECtHR in the field of voting rights and demonstrate how ‘the creation of a Europe-wide personal *status* of citizen of the EU can result in a quite substantial intrusion into the national electoral sovereignty of the Member States.’¹⁸⁰ While *Gibraltar* (like *Minor v. Happerset* in the US context) affirmed the autonomy of the member states in expanding the franchise to third-country nationals, *Aruba* and *Matthews* asserted the authority of the ECJ and of the ECtHR in reviewing the reasonableness of the states’ disenfranchisement of EU citizens residing abroad.¹⁸¹ These

¹⁷¹ *Aruba*, at §29.

¹⁷² *Id.*, at §32.

¹⁷³ *Id.*, at §45.

¹⁷⁴ *Id.*, at §57.

¹⁷⁵ Case C-145/04 *Spain v. UK (Gibraltar)* [2006] ECR I-7917.

¹⁷⁶ Cf. M.E. Gennusa, ‘La Cedu e l’Unione Europea’ [The ECHR and the EU], in M. Cartabia (ed.), *I diritti in azione* (Il Mulino 2007) p. 91 at p. 126.

¹⁷⁷ Cf. L. Besselink, ‘Case Note: *Spain v. UK*’, 45 *CMLRev.* (2008) p. 787.

¹⁷⁸ *Gibraltar*, at §70.

¹⁷⁹ *Id.*, at §74.

¹⁸⁰ Shaw, *supra* n. 13, p. 189.

¹⁸¹ Cf. Besselink, *supra* n. 177, p. 806.

precedents could therefore plant the seeds for future developments in judicial review of national laws and practices restricting the suffrage of EU citizens. At the same time, one needs to be aware that all cases dealt with the reach of voting rights for the European Parliament and concerned quite specific issue (linked to the peculiar *status* of the overseas territories of Gibraltar and Aruba). It is uncertain therefore whether these decisions will produce long-term effects in the regulation of electoral rights at the EU level.

Similar cautions must surround the appreciation of the innovations introduced by the Lisbon Treaty. The entry into force of the new EU pact on 1 December 2009 has not brought about path-breaking reforms to the substance of EU citizens' rights.¹⁸² Despite bringing human rights at the core of the European integration project (by attributing binding value to the EU Charter of Fundamental Rights and requiring the accession of the EU to the ECHR),¹⁸³ the Lisbon Treaty leaves unmodified the voting rights clauses originally codified in the TEC and does not grant additional competences to the EU in the field of electoral law.¹⁸⁴ Nevertheless, following the case-law of the ECJ – which began around ten years ago to emphasize how EU citizenship 'is destined to be the fundamental *status* of nationals of the Member States',¹⁸⁵ the Lisbon Treaty has maintained an amendment to the definition of EU citizenship originally proposed during the Constitutional Convention.¹⁸⁶

As already mentioned,¹⁸⁷ in fact, Articles 9 TEU and 20 TFEU (replacing former Article 17 TEC) now state that EU citizenship 'shall be additional to [...] national citizenship' – with the wording 'shall be additional to' replacing 'shall complement.' 'This seems a very small and cosmetic amendment. It was however done for a reason and it is submitted that this modification supports a move to-

¹⁸² Cf. A. Schrauwen, 'European Union Citizenship in the Treaty of Lisbon: Any Change at All?', 15 *MJ* 1 (2008) p. 55 at p. 63.

¹⁸³ Cf. M. Cartabia, 'I diritti fondamentali e la cittadinanza dell'Unione' [Fundamental Rights and Citizenship of the Union], in F. Bassanini and G. Tiberi (eds.), *Le nuove istituzioni europee: Commento al Trattato di Lisbona* (Il Mulino 2008) p. 81; W. Weiß, 'Human Rights in the EU: Re-thinking the Role of the European Convention on Human Rights After Lisbon', 7 *EuConst* (2011) p. 64.

¹⁸⁴ Cf. Kochenov, *supra* n. 57, p. 220.

¹⁸⁵ See Case C-184/99 *Grzelczyk v. Centre public d'aide sociale* [2001] ECR I-6193 §31; Case C-224/98 *D'Hoop* [2002] ECR I-6191 §28; Case C-148/02 *Garcia Avello* [2004] ECR I-11613 §22. On the development of the ECJ's case-law in the field of EU citizenship cf. D. Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change', 68 *Modern L. Rev.* 2 (2005) p. 233; J. Mather, 'The Court of Justice and the Union Citizen', 11 *European L.J.* 6 (2005) p. 722.

¹⁸⁶ Cf. C. Ladenburger, 'Fundamental Rights and Citizenship of the Union', in G. Amato et al. (eds.), *Genesis and Destiny of the European Constitution* (Bruylant 2007) p. 311 at p. 318.

¹⁸⁷ See *supra* n. 40.

wards a more independent Union citizenship.¹⁸⁸ Whereas a complementary EU citizenship cannot exist in the absence of a national citizenship,¹⁸⁹ 'if EU citizenship is *additional* to national citizenship, then there might one day be EU citizenship without national citizenship.'¹⁹⁰ This innovation has a potential relevance on the regulation of electoral rights for EU citizens as an expanded conception of EU citizenship could be the basis for future decisions by the ECJ aimed at protecting EU citizens' voting rights when resident in another member state.

A number of very recent judicial pronouncements, indeed, reveal that the ECJ appears willing to make use of the concept of EU citizenship in order to expand the fundamental rights standards protected under EU law even to situations traditionally regarded as falling within the exclusive purview of the member states. The *Rottmann*¹⁹¹ and *Zambrano*¹⁹² cases are recent and well-known evidence in this regard.¹⁹³ Emphasizing the central role of EU citizenship in an enlarged Europe, therefore, it has been argued that the ECJ should review national electoral laws denying expatriate voting: these legal measures, by disenfranchising from national elections EU citizens who have moved to another EU state, 'discourage[] EU citizens from moving from their Member States of nationality to other Member States'¹⁹⁴ and unduly burden their right to free movement¹⁹⁵ (i.e., the Union's equivalent of the right to interstate travel in the US).

¹⁸⁸ Schrauwen, *supra* n. 182, p. 59.

¹⁸⁹ Cf. S. Cassese, 'La cittadinanza europea e le prospettive di sviluppo dell'Europa' [European Citizenship and the Prospects of Development of Europe], *Riv. It. Dir. Pubbl.Comunit.* 5 (1996) p. 869 at p. 870 and A.M. Guerra Martins, 'Citizenship of the European Union: Conditions of Citizenship', 19 *European Rev. Pub. L.* 1 (2007) p. 83 at p. 86.

¹⁹⁰ Schrauwen, *supra* n. 182, p. 60 (emphasis in original).

¹⁹¹ Case C-315/08 *Rottmann v. Freistaat Bayern*, judgment of 2 March 2010 nyr (holding that the decision of the German *Land* Bayern to deprive a German citizen – and thus an EU citizen – of his nationality – and thus of EU citizenship – had to be reviewed for its compatibility with the EU principle of proportionality).

¹⁹² Case C-34/09 *Zambrano*, judgment of 8 March 2011 nyr (holding that EU law granted a national of a member state – and thus an EU citizen – the right of residence for himself and his third-country national parents in his member state of nationality, irrespective of the previous exercise by him of free movement in another EU state).

¹⁹³ But see Case C-434/09 *McCarthy*, judgment of 5 May 2011 (holding that the EU citizenship provisions do not apply to a citizen who has not exercised his free movement rights and has always resided in his member state of nationality).

¹⁹⁴ Kochenov, *supra* n. 42, p. 219.

¹⁹⁵ Among the ECJ's decisions reviewing states' measures which burden the EU citizens' freedom of movement see Case C-192/95 *Tas-Hagen en Tas* [2006] ECR I-10451 (declaring contrary to EU free movement rights a Dutch law which granted a pension to Dutch civilian war victims only if they reside in the Netherlands); Joined Cases C-11 & C-12/06 *Morgan* [2007] ECR I-9161 (declaring contrary to EU free movement rights a German law which set as a condition for the obtainment of an educational grant for studying in another member state that the studies are continuation of the educational activity pursued for at least one year in the home member state).

Yet, it is difficult to predict whether the ECJ will swiftly expand its oversight over states' franchise laws to ensure greater protection for the voting rights of EU citizens (as second-country nationals). As the example of the US cautions, the Supreme Court for almost a century refused to scrutinize states' electoral laws, even though the 14th Amendment had clearly established the supremacy of federal over states' citizenship. Moreover, it can be questioned whether the action of the ECJ might achieve truly satisfactory results: were the ECJ to review under its free movement jurisprudence state laws disenfranchising EU citizens moving in another EU state, in fact, its decision would have an effect opposite to that of the US Supreme Court's decision in *Dunn v. Blumstein*. Whereas the latter forced the state of residence to enfranchise all resident US citizens, the ECJ would only compel the state of nationality to grant absentee ballots to its expatriate citizens without, however, empowering them to vote in their new EU state of residence.

As a consequence, it seems that only additional developments within the European multilevel architecture would be capable of providing a satisfactory answer to the inconsistencies emerging in the field of electoral rights for non-citizens. From a normative point of view, it might be advisable for the member states and the EU institutions to tackle the democratic challenge posed by the disenfranchisement of non-citizens by devising further changes in EU primary and secondary law.¹⁹⁶ Elsewhere I have advanced several proposals for reforms *de jure condendo* which I shall not discuss in this article.¹⁹⁷ What has to be remarked, however, is that any future discussion about the legal tools to overcome the tensions of the European electoral rights regime will have to address the broader question of the nature of the European political community as well.¹⁹⁸ Indeed, there are at least two competing visions about the purpose of the European integration project and

¹⁹⁶ Cf. R. Rubio Marin, *Immigration as a Democratic Challenge* (Cambridge UP 2000). In support of a normative approach to the questions of European citizenship *latu sensu* cf. M. La Torre, 'Citizenship, Constitution and the European Union', in M. La Torre (ed.), *European Citizenship: An Institutional Challenge* (Kluwer 1998) p. 435 who argues at p. 437 that since the concept of EU citizenship is 'not yet permanent and allows for evolution, an evolutive interpretation of it and even a *de lege ferenda* approach are legitimate.'

¹⁹⁷ Cf. Fabbrini, *supra* n. 8, p. 30 et seq., where I argue that, on the one hand, the states could amend the EU treaties in order to allow EU citizens residing in another member state to vote also in national elections there; and, on the other hand, the EU institutions could enact legislation to ensure voting rights at the local level for all long-term resident third-country nationals; or – more structurally – the member states could empower the EU to enact a uniform naturalization law by which aliens could directly acquire EU citizenship and rights.

¹⁹⁸ For a reflection on the European political identity and its legitimacy compare M.P. Maduro, 'The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism', 3 *I-Con* (2005) p. 332 and M. Kumm, 'To Be a European Citizen? The Absence of Constitutional Patriotism and the Constitutional Treaty', 11 *Columbia J. Eur. L.* (2005) p. 481.

the choice between them will determine which path the EU voting rights regime might follow.¹⁹⁹

One vision considers the European project exclusively as an international arrangement of limited scope. For those who agree with this view, there are valuable arguments to sacrifice further consistency in the regulation of electoral rights for non-citizens on the shrine of national sovereignty. Another vision, on the contrary, conceives the ultimate goal of European experiment to be the creation of a borderless polity in which EU citizens can enjoy equal constitutional rights. Those who support this alternative idea, hence, regard, e.g., as 'arguably wholly inconsistent for the EU and the Member States to [enfranchise, EU citizens] in relation to *local* and *European* [elections] whilst ignoring the impact upon democratic participation in *national* elections.'²⁰⁰ Since these visions are based on conflicting understandings of the finality of European integration, the remedies that they advance to address the challenges of citizenship and electoral rights shape opposite prospects for the future political identity of Europe and the legitimacy of its trans-national democracy.

In synthesis, an analytical comparison between the US and Europe highlights the existence of both similarities and differences in the regulation of voting rights for non-citizens and allows to contextualize some recent European developments. The transformations brought about by the recent jurisprudence of the ECJ and the ECtHR and by the entry into force of the Lisbon Treaty have opened several interesting scenarios concerning the protection of electoral rights for non-citizens. Yet these developments reveal that the European electoral rights regime is still afflicted by a number of unresolved tensions and inconsistencies. As the US experience in the field of electoral rights for non-citizens demonstrates, however, constitutional change in a complex federal system is an ever-ongoing process, subject to incremental developments rather than revolutionary breaks.²⁰¹

¹⁹⁹ For an discussion of the competing visions on the European integration project cf. R. Howse and K. Nicolaidis, 'Introduction: The Federal Vision, Levels of Governance and Legitimacy', in R. Howse and K. Nicolaidis (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford UP 2001) p. 1. On the importance that in the US has played the emergence of the self-conception of being 'one nation' (rather than simply a 'compact of states') in developing a political-constitutional identity cf. then M. Rosenfeld, 'The European Treaty-Constitution and Constitutional Identity: A View From America', 3 *I-Con* (2005) p. 316.

²⁰⁰ Shaw, *supra* n. 13, p. 195 (emphasis in original). Cf. also Kochenov, *supra* n. 42, p. 201 who argues that 'eligibility to vote and stand as candidates at the national elections in the Member State of residence [...] should logically be the ultimate goal of the development of European citizenship.'

²⁰¹ Cf. also Editorial, 'The EU and Constitutional Change', 6 *EuConst* (2010) p. 335.

CONCLUSION


This article has analysed the regulation of electoral rights for non-citizens in the European multilevel constitutional architecture. Its purpose has been to examine the critical implications that emerge in the field of electoral rights for non-citizens from the complex interaction between national and transnational law in Europe, in a comparative perspective with the US federal experience. The article has argued that the overlap and the interplay between domestic and supranational law have produced new challenges and pressures in the field of electoral rights for non-citizens. In particular, it has been maintained that the development of a substantive body of laws regulating voting rights beyond the states has placed under strain those domestic laws and practices constraining the electoral entitlements of second-country nationals or *tout court* disenfranchising third-country nationals.

A summary review of national legislation regulating voting rights for non-citizens has revealed the existence of significant differences among the EU member states on the issue of alien suffrage. Whereas there are countries which have adopted a broad conception of the franchise, extending voting rights to non-citizens even in national elections, in other member states an extremely restrictive approach has traditionally prevailed, preventing any extension of the suffrage to aliens. Despite these variations among the EU countries, however, since the 1990s member states have lost their full sovereignty on the issue of electoral rights for non-citizens as a consequence of the growing impact of supranational law. While the CPFPL has enhanced the right of political participation for third-country nationals at the local level, the EU Treaty has established a right for second-country nationals who permanently reside in another EU member state to cast a ballot in local and EU elections in their member state of residence.

This complex overlap of domestic and supranational laws has created new tensions and inconsistencies in the picture of electoral rights for non-citizens in Europe. As I have claimed, however, these challenges are not *sui generis*: rather, they are reflected in the US federal experience. In the original US constitutional arrangement, competence on electoral rights for non-citizens was reserved to the states, which had widely diverging laws. Through a series of constitutional, legislative and judicial reforms, however, the federal government step by step intervened in the regulation of the electoral rights of non-citizens, especially in order to ensure that US citizens could enjoy voting rights for all elections in any state in which they resided. The power to extend voting rights to third-country nationals, instead, still today belongs the states, but the federation has been empowered since its foundation to enact a general naturalization act that allows aliens to become US citizens, and acquire electoral rights, by following a uniform procedure.

In light of the US example, the developments triggered in Europe by the recent case-law of the ECJ and the ECtHR and by the entry into force of the Lisbon

Treaty seem to open possible interesting scenarios for the future but do not entirely address the existing challenges in the field of electoral rights for non-citizens. From this point of view, additional reforms of EU law might be advisable but remain inextricably linked to what vision of the European political project will prevail in the future. As an early observer of the US constitutional system noticed, 'there is no more invariable rule in the history of society: the further electoral rights are extended the greater is the need for extending them: for after each concession the strength of democracy increases and its demands increases with its strength.'²⁰² Whether Europe will follow this pattern as well remains a tantalizing question that only the future can answer.



²⁰² A. de Tocqueville, *Democracy in America* (1835), book 1, ch. 4.